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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 586

WILLIAM SKALLY AND WILLIAM RUSSO,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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No. .....

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

William Skally and William Russo, Petitioners, pray that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered in the above entitled cause on the 14th day of January, A. D. 1954, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, finding the defendants guilty of forging, counterfeiting, possessing, etc. of counterfeit securities of the United States and of a conspiracy so to do and sentencing them to the custody of the Attorney General for a period of three years. (R. 867.)

OPINION BELOW.

The trial court filed no opinion and the opinion of the United States Circuit Court of Appeals for the Seventh Circuit (R. 876) has not been reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals sought to be reversed was entered on the 14th day of January, 1952. (R. 876.) No petition for rehearing was filed. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code.

QUESTIONS PRESENTED.

(A) Should the Defendant, William Skally, have been convicted when the facts and circumstances disclose a clear case of entrapment in that: (1) The crime originated in the mind of the informer Drake who was employed by the Government and the State's Attorney's office and not in the mind of this defendant; (2) The evidence establishes that the defendant, William Skally was not in the inception, ready, willing or able to commit the alleged offense and would not have done so except for the action of a Government informer; (3) There is no showing that the defendant, William Skally, had been previously guilty of any similar offense or that he was then suspected by the Government of dealing in counterfeit currency or that there were any reasonable grounds for suspecting him, and that (4) No crime against the Government would have been committed had the informer not induced its commission.

(B) Should the defendant, William Russo, be granted a new trial when the Court of Appeals found that improper and prejudicial evidence was admitted against him, especially in view of the facts that (a) There was no direct evi-

dence of an intent to commit any of the offenses charged in the indictment; (b) There was no evidence, direct or circumstantial that this defendant ever made, uttered, or otherwise dealt in counterfeit money.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

(1) In affirming the judgment of the District Court finding the defendants, William Skally and William Russo, guilty.

(2) In holding that the clear entrapment of the defendant, Skally, was waived by his failure to present that issue in the trial court.

(3) In failing to hold that the introduction of the forfeiture agreement, which the Government treated as a confession, did not constitute prejudicial and reversible error.

STATEMENT OF FACTS.

The defendants, William Skally, William Russo, Sam Sferas and James Sferas were indicted March 12, 1952 in an indictment consisting of fourteen counts. (R. 2.) Counts number 1 to 7 both inclusive are directed solely against the defendants, William Skally and William Russo. (R. 4-6.) Counts number 9 to 13 both inclusive are directed solely against Sam Sferas and James Sferas. (R. 8-10.) Count 14 is a conspiracy count naming all of these defendants and charging them with a conspiracy to make, forge, counterfeit, possess, pass, utter, publish, sell, exchange, transfer and deliver forged counterfeit obligations and securities of the United States in violation of Sections 471, 472 and 473, Title 18 of the United States Code. (R. 11.)

The case was tried by the court with a jury. (R. 28.) At

the close of the Government's case all of the defendants moved the court for a directed verdict, which motions were overruled. (R. 21.) The same motions were renewed at the close of all the evidence and were denied. (R. 22.) The cause was submitted to the jury. A verdict was returned finding all of the defendants guilty. Written motions for a new trial were made by the defendants, William Russo, James Sferas and Sam Sferas and an oral motion for a new trial was made in behalf of the defendant, William Skally. (R. 832.) The various motions so made were overruled and the court sentenced the defendants to the penitentiary for three years. (R. 842, 843.)

THE GOVERNMENT'S CASE AGAINST WILLIAM SKALLY.

The Government's case against Skally was predicated almost in its entirety upon the dubious testimony of an ex-convict, John Valdovic, alias John Drake. (R. 119-254.) At the time of the occurrences, this informer was under indictment in Cook County for "hijacking" (R. 117) and at the special instance and request of Police Lieutenant Oakley (R. 488) and Special Agent Harry Anheier who is in charge of the United States Secret Service in Chicago had been given a lucrative job with the post office department in the foreign mail department.

Informer Drake first met William Skally on October 1, 1951 when he was introduced to him by an attorney at Malizia's Pizza Restaurant and Tavern in Chicago. Drake had been told by the attorney that Skally had some "bonds" to dispose of. In the conversation with Skally bonds were mentioned first but later the informer told Skally that he had connections for the sale of counterfeit money in St. Louis and that he would contact his party. *Skally specifically told him that he had no counterfeit money available.* (R. 120, 121.)

Again on October 31, 1951, the informer was told by Skally that he didn't have any counterfeit money available and that if Drake wanted some he would have to *"come up with $2,500.00 for materials because the fellow would have to see something even before they started making the money."* (R. 123.)

On November 20, 1951 Drake was introduced to Secret Service Agent Joseph Sullivan by Anheier at the Croyden Hotel and thereafter on the same evening, Drake introduced Sullivan to Skally as "Joe Costello." (R. 123.) In this conversation Drake told Skally that he had made his contact and that the man was there and wanted to talk to him. Skally said that Drake should not have brought him there. (R. 124.) Skally and Sullivan first talked about "City Service" bonds, which Drake said he believed were stolen. (R. 124.) Sullivan said he wouldn't handle the bonds because something had blown up in New York and the bonds were too hot. (R. 125.) Sullivan then indicated that he was on the market for counterfeit money, but that he would first have to "see something." (R. 125.)

It is significant that in this conversation Skally told Sullivan that *"we haven't got any"* (*counterfeit money*) and *"I can't get any."* (R. 132.) When Drake and Skally were again alone in the tavern, Skally told Drake not to bring Sullivan there anymore. (R. 125, 126.) Later on, during the same evening Drake, at the request of Sullivan, telephoned Skally and in this conversation told him that he didn't believe Sullivan wanted any bonds but was interested in "curly." He was advised by Skally that *"then the deal is off and there was no 'curly'."* (R. 126.)

On November 26, 1951 Drake again met Skally at Malizia's tavern where Skally produced two ten dollar and two twenty dollar federal reserve notes and asked Drake to look at them and told him that he could get some if he would come up with at least $2,500.00 *because they needed*

it for paper and for ink and for supplies to make "the stuff" with. Drake took the notes to the officers. The following day at the request of Anheier, Drake called Skally and told him that Sullivan was in and to go ahead with the schedule as planned.

On November 29, 1951 Drake gave Skally two hundred dollars which he had received from Sullivan. Skally told him "I cannot go to these guys with this" and that "It would be eight or nine days or possibly two weeks before he would have any of the stuff." (R. 134, 135.) Drake then advised Skally that his man was willing to take $50,000.00 worth in all, but not all at one time. The first to be for $15,000.00 and the remainder later. (R. 135, 136.)

On or about December 17, or 18, 1951 Drake had a conversation with Skally in a tavern in Chicago. Skally then told him that the stuff was all wrapped up in a nice neat package, "like a Christmas package" and it would be sitting on the radiator at the door going out. As Drake left Skally told him to hurry back and he would meet him at Malizia's place on Cicero Avenue. After this conversation Drake walked towards the door and found a package wrapped in brown paper, which he picked up and subsequently delivered to the Government agents. (R. 139, 140.) After delivering the package the agents gave Drake seven or eight hundred dollars in currency to be delivered to Skally. (R. 140.)

The same evening Drake telephoned Skally and told him that everything was "okay" and that he would meet him in a few minutes, at which time he gave Skally the six hundred and fifty dollars. (R. 142.) Drake testified that when delivery was made, Skally asked him when Sullivan would be ready to take the balance of the bills and was told by Drake that he would contact him later.

On December 21, 1951 at about two or three o'clock in

the morning Drake testified that he was at home, asleep when he heard a knock on the door. His wife answered the door and an unknown party handed her a package and said "hand this to John." Drake turned the package over to the Government agents. (R. 142, 143.)

The following day Drake went to the hospital where Skally contacted him and asked him about payment for the money delivered the night before and was told that "he would receive it". On the same day Drake had a telephone conversation with Skally, in the hospital, at which time he told Skally to meet Sullivan at a shoe store.

Pursuant to this conversation Agent Sullivan met Skally at the shoe store at 7 South Halsted Street where Sullivan handed Skally $2,450.00 in United States currency. (R. 33.) At the same time Sullivan told Skally that he would like to see him about January 1st. When Skally received this money from Sullivan he stated "this is not my deal. I am just doing this for a friend who is sick. I am just picking this up for him." (R. 34.)

Nothing further occurred until January 11, 1952 when Sullivan phoned Skally and told him that he tried to get in touch with Johnny Drake but that his wife said he was out of town. He requested Skally to come down to his hotel. Skally stated that he did not wish to come downtown but that he would call him back and that he would tell him where to meet him. Subsequently Skally called back and told Sullivan to meet him at a drug store at 9:15 in the evening. Pursuant to his arrangement Sullivan and Skally met. Sullivan told Skally that he wanted to make some arrangements where he could get an additional supply of "curly" on Wednesday or Thursday. At this time Skally said "Well, that is John's deal." In reply Sullivan stated that he didn't care whose deal it was, and that he just wanted to get "the curly." Skally replied that "we will give it to you." (R. 34, 35.)

On February 2, 1952, Drake and Skally again met at Malizia's at which time Drake told Skally that Sullivan was back in town and Skally replied that "we are all set" and asked Drake to accompany him to his car. Drake reported this conversation to the agents and subsequently met Skally between nine and ten o'clock at Malizia's. (R. 150.)

Drake then got into Skally's car and they drove into the park district. They stopped at Pulaski and Lake street when Drake advised Skally that "he didn't expect to buy the stuff tonight" and stated that he wanted to make a telephone call. They made another stop at a filling station where Drake again called Sullivan. When they got back in the car Skally said that they would drive a little further and when a car pulls up he would stop and that Drake was to get out and get into the other car (R. 149), but not to say anything to the driver and when everything was okay, come back to Malizia's. (R. 150.)

They drove around in the vicinity circling three or four blocks traveling very slow. Shortly a car pulled up and Drake got into the other car which he said was driven by Russo. Russo then said: "When I honk the horn and you see a fellow with a package, let me know and roll down your window. He will give you the package. "They then circled again and shortly thereafter Drake advised Russo that there was a man at the corner with a package. Drake opened the door of the car and the unidentified stranger handed Drake a package. Drake got out of the car at a cab stand and called Sullivan and told him he had the package.

The same night a government agent gave Drake three thousand three hundred dollars in United States currency. Subsequently Drake entered Malizia's tavern where he met Skally. Drake walked in and Skally followed him to the washroom and gave Skalley the money. Skally returned to Drake approximately seven hundred dollars and Drake

walked out of the tavern and signalled the Secret Service Agent who entered the tavern and arrested Skally. (R. 280.)

SKALLY'S DEFENSE.

Skally admits that he met Sullivan through Drake about November 20, 1951 when Drake introduced Sullivan as "Costello". He denied any conversation with Costello relating to counterfeit money. (R. 626.)

He admitted that he met Sullivan (Costello) in the store on Halsted Street and accounted for the money he there received from Sullivan by stating that Drake owed him approximately $400.00 on bets and had requested him to meet Sullivan at this place because Sullivan owed Drake a large sum of money and that Drake was unable to meet him. This was during the period that Drake was presumed to be in the hospital, or in Indiana. (R. 626, 627.) He admitted keeping $400.00 out of this money to pay Drake's debt to him and that at Drake's request he gave Mrs. Drake some of the money and subsequently returned the balance to Drake. (R. 628, 629.)

Skally further testified that in January of 1952 Drake was again indebted to him in the sum of $320.00 which he had been unable to collect. He testified that on or about January 17, 1952 Drake told Skally that "Costello" was back in town and that he owed Drake some money because Drake was unable to be there and asked Skally to call "Costello" up at his hotel and to meet him and collect $1,000.00. In this way Skally was to collect the money and collect the $320.00 due him from Drake. Pursuant to this conversation Skally called Sullivan (R. 630-632) and met him at Roosevelt and Western Avenue.

At this time Sullivan said that he was there to get the counterfeit money and that he had $3,500.00 in his pocket for that purpose. Skally said "Brother, you have the wrong

party'' and he walked out. Skally then made an appointment with Sullivan for later in the evening and attempted to contact Drake but was unable so to do. He did not keep the appointment made with Sullivan. (R. 632-633.)

While Skally admits that he had been previously convicted of violation of the alcohol tax law, he denied that he ever engaged in any transaction involving either counterfeit money or counterfeit bonds. Repeated attempts to obtain a confession from him failed. (R. 639.) None of Skally's finger prints or handwriting was found on any of the counterfeit money or on any package in which the money was allegedly delivered.

THE GOVERNMENT'S CASE AGAINST RUSSO.

The evidence shows that William Russo was a small time ''bookie'' who had customers in the vicinity of Malizia's tavern. He accepted bets from them and turned the bets over to Skally. He was convicted once when he was seventeen years of age and served a term of six months in the County Jail. (R. 680.)

The only evidence against Russo is that of several of the Government agents who testified that they saw him on the night of December 18, 1951 outside of Bill's tavern when he entered the tavern with a package and that they subsequently saw Drake leave the tavern with a similar package and the testimony of Drake that Russo was the driver of the automobile at the time the counterfeit money was delivered. (R. 150, 152.)

Neither Russo's fingerprints nor handwriting was found on any of the packages or on the counterfeit money. While it is true that Russo was seen in the presence of Skally on several different occasions, there is no evidence of any conversation between the two or that their presence in the same place in any way involved the charges made in this

case. Russo's Cadillac was subsequently seized by the government and thereafter released by the government upon the payment by Russo of three hundred dollars.

The Government also introduced in evidence a document signed by Russo pertaining to the release of this automobile from the government's custody, which contained the following statement:

> "This automobile was seized on February 4, 1952 by special agents of Secret Service after having been abandoned by the owner for the transportation therein of counterfeit ten and twenty dollar federal reserve notes." (R. 698.)

The Government argued that this "bit of evidence" was tantamount to a confession.

RUSSO'S DEFENSE.

Russo admits that he knew Skally and that he was a bookie and was engaged in making bets which he transferred to Skally on a commission basis. He denies any knowledge of any counterfeit money. He denied that he was the driver of the car in which Drake was riding when he received the counterfeit money. (R. 670, 672.)

Russo admits that he signed a Government's document for a return of his forfeited automobile and that he negotiated with an automobile dealer to accept the car but states that he did not read the documents which bore his signature. (R. 698.)

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I.

The Evidence in This Case Clearly Shows That Skally Was Entrapped by the Government.

It is conceded that the Government may use informers and decoys to "ferret out" violations of the law but they may not induce the commission of a crime by planting the seeds for its commission in the minds of a defendant. In the case at bar the crime alleged would never have been committed but for the acts of the Government. The evidence in this case shows that the Government had no real reason to believe or suspect that Skally was engaged in the business of selling or otherwise dealing with counterfeit money. The evidence, in fact, negatives the idea.

At the time Drake first contacted Skally, Skally did not have in his possession any counterfeit money. He was not ready, willing or able to sell counterfeit money to anyone. In fact, he refused to even consider a sale of counterfeit money. At all times when he was approached by Sullivan with reference to counterfeit money he said that that "was not his deal." The criminal act for which the government now seeks to punish this defendant arose and originated solely in the mind of the informer and agents and not in the mind of this defendant. This constitutes entrapment.

There is no evidence in the entire record indicating in any way a belief or even a suspicion on the part of the government that this defendant was engaged in the business of dealing with counterfeit money. There is no evidence in the record that before this occurrence any agent of the government ever knew or heard of this defendant. Drake himself was an ex-convict and had served a term in the penitentiary and was, at the time, under indictment for "hijacking." He had been used by the State during this

time as an informer. He was paid well by both the State and the Government. His very existence depended upon convictions.

Skally, at the time he was requested to deliver counterfeit money to Drake, had no counterfeit money in his possession nor under his control. The most that can be said is that he may have had some knowledge of where some might in the future be obtained. He stated that under no condition could they obtain it now. It was not available. The best that he offered to do was to try to get some in the future. (R. 120.)

In *Voves* v. *United States,* 7th Cir., 191 Fed. 19, Judge Baker said:

> "Grant that the government may use a decoy to discover evidence of a committed crime of whatever nature; that, where one has the intent to commit a *malum in se,* or the willingness to do a *malum prohibitum,* a decoy may accompany the wrongdoer and even participate in the offense; * * * still the question remains: May the government maintain an indictment against a person for doing a *malum prohibitum* when the government's conduct has misled the person * * * we are strongly of the view that sound public policy estops the government from asserting that an act which involves no criminal intent, was voluntarily done when it originated in and was caused by the government agent's deception."

In the same case the Court remarked that "Voves had not been selling or giving liquor to the Indians. The government agents had no reason to suspect that he had been or would do so."

In the case of *Woo Wai, et al.* v. *United States,* 233 Fed. 412, the Ninth Circuit Court of Appeals speaking through Judge Gilbert at page 414 said:

> "In the case at bar, there is no evidence that prior to the time when detectives first approached Woo Wai

any of the defendants had ever been engaged in the unlawful importation of Chinese or had ever committed or thought of committing any offense against the immigration laws."

As in the case at bar, this defendant was inducted to commit a crime which he had no previous intention of committing. The crime, if committed, was upon the solicitation of the Government's informer. In the case at bar the intention to commit the offense had its origin in the minds of the government and not in the minds of the defendant.

In the case of *Butts* v. *United States*, 8 Cir. 273 Fed. 35, the Court at page 38 of its Opinion said:

> "But when the accused has never committed such an offense as that charged against him prior to the time when he is charged with the offense prosecuted and never conceived any intent of committing the offense prosecuted, or any such offense, and has not the means to do so, the facts that the officers of the government incited and by persuasion and representations lured him to commit the offense charged, in order to entrap, arrest and prosecute him therefor, is and ought to be fatal to the prosecution and to entitle the accused to a verdict of not guilty.
>
> While it may be true that the mere aiding of one of the commission of a criminal act by the government officer and agent does not preclude the conviction of the party committing the crime, yet where the officers of the law having no knowledge that a defendant ever committed such a crime or ever intended to commit such a crime induced the party to commit the crime charged and lured him on in its consummation, the law cannot authorize a verdict of guilty."

In the case at bar the government did not set up a trap for a known suspect to decoy him into breaking the law. They did far more. They induced a man who had no intention of committing the act charged, who possessed no counterfeit money and who was not engaged in that business,

to commit an act which he would not otherwise have committed. (*Sorrells* v. *United States,* 287 U. S. 435.)

In *Desalvo* v. *United States,* 8 Cir. 2 F. 2d 222, at p. 225, Judge Lewis speaking for the Court said:

> "On the facts that are disclosed we think that it cannot be conclusively said as a matter of law that the representatives of the government stopped with setting a decoy for a suspected lawbreaker, and only stood by while he fell into the trap. There was evidence tending to show that the defendant had never theretofore dealt in narcotics, that the officers participated in devising the criminal act. * * *"

The evidence in this case negatives any contention that Skally, prior to the solicitations of Drake, ever intended to, or had ever made a sale, or in any way dealt with counterfeit money, or that he had ever been suspected of so doing.

The only conclusion that can be drawn from this evidence is that Drake, in order to avoid the consequences of his own criminal acts, and to gain leniency, with the aid and knowledge of the government's agents, enticed and entrapped Skally to commit an offense against the United States Government. The one thing that Drake desired was to entrap and convict someone. He was employed for this purpose. It mattered not to him that the defendant had not previously committed the offense charged and had no intention so to do. He created a crime where none was contemplated. He induced and incited the commission of a crime which he would not otherwise have committed. There certainly must be bounds beyond which an agent of the law should be permitted to go in order to satisfy his zeal or desire to convict.

In the case of *Casey* v. *United States,* 276 U. S. 413, Mr. Justice Holmes speaking for the majority of the Court held that there was probable cause to believe Casey to be an habitual seller of narcotics and for that reason the govern-

ment in seeking to obtain evidence against him was not inducing a criminal offense. The decision is predicated upon the fact that there was evidence tending to show that Casey had previously been guilty of selling narcotics to prisoners in the jail because "after Casey's visits the addicts were noticed to be under the influence of narcotics." In a strong dissenting opinion in this case Mr. Justice Brandeis at page 423 said:

> "I am aware that Courts—mistaking relative social values and forgetting that a desirable end cannot justify foul means—have, in their zeal to punish sanctioned the use of evidence obtained through criminal violation of property and personal rights or by other practices of defectives even more revolting. But the objection here is of a different nature. It does not rest merely upon the character of the evidence or upon the fact that the evidence was illegally obtained. The obstacle to the prosecution lies in the fact that the alleged crime was instigated by the officers of the government; that the act for which the government seeks to punish the defendant is the fruit of their criminal conspiracy to induce its commission. The government may set decoys to trap criminals but may not provoke or create a crime and then punish the criminal, its creator. If Casey is guilty of the crime of purchasing 3.5 grains of morphine on December 31st as charged, it is because he yielded to the temptation presented by the officers. Their conduct is not a defense to him. For no officer of the government has power to authorize the violation of an Act of Congress and no conduct of an officer can excuse the violation. But it does not follow that the Court must suffer a detective made criminal to be punished. To permit that would be tantamount to a ratification by the government of the officer's unauthorized and unjustifiable conduct."

In the case at bar there is no evidence that Skally ever previously attempted to deal in counterfeit money. He advised Sullivan that "that was not his deal." He was not

ready nor able to transfer any counterfeit money at the time he was requested so to do. The fact that he was not in the business of selling or dealing in counterfeit money is clearly demonstrated by the evidence. The most that can be said of his action, even if Drake is to be believed, is that he had some knowledge of where counterfeit money might be made, if sufficient funds were provided to pay for the initial outlay for paper, ink and other essentials necessary for its manufacture.

In the case of *O'Brien* v. *United States,* 7 Cir., 51 F. 2d. 675, Mr. Justice Evans speaking for the court on page 679 of the opinion said:

> "The test deducible from these decisions turns upon the issue of inducement. If the accused entertained the criminal intent before he was afforded the opportunity to violate the law, he is in no position to plead estoppel. * * * It is the fact that one who was induced to act in a manner which he would not otherwise have acted, by inducement of another, that makes applicable the Doctrine of Estoppel. * * *."

The defense of entrapment when proved constitutes a complete defense to the charges alleged. (*Jarl* v. *United States,* 8 Cir., 19 F. 2d 891; *Butts* v. *United States,* 8 Cir., 273 Fed. 35; *O'Brien* v. *United States,* 7 Cir., 51 F. 2d 675.)

The case at bar in its very inception constituted an entrapment and this defendant was entitled to his discharge.

II.

The Introduction of Documents Relating to the Seizure of Russo's Automobile Constituted Prejudicial and Reversible Error.

Over the objection of the defendant, Russo, the Government introduced Exhibits No. 10-A and 10-B in evidence. These exhibits were labeled "Report of Forfeiture" and "Assent to Forfeiture." It was a mere receipt for the automobile. Both were signed by Russo in order to recover his automobile, after it was seized by the Government. They were but "forms" and constituted a part of the negotiations of Russo with Government agents for the return of his automobile. Exhibit 10-B contained over Russo's signature this legend:

> "This automobile was seized on February 4, 1952 by special agents of Secret Service after having been abandoned by the owner for the transportation therein of counterfeit ten and twenty dollar federal reserve notes."

The Government contended and the jury treated it as a confession of guilt.

It must be noted that the form so signed was made out by the Government. Russo testified that he did not read or know the contents of this exhibit at the time he signed it. It should not have been received in evidence. It was highly prejudicial to the rights of this defendant and deprived all the defendants of the fair and impartial trial contemplated in our law. (Tr. 687, 688, 698.)

III.

The Questions Involve Fundamental Rights and Are of Far-Reaching Importance.

The opinion of the Circuit Court of Appeals is predicated upon the failure of the defendant to raise the defense of entrapment at the trial. The court ignored rule 52(b) of Federal rules of Criminal Procedure which provides that plain errors and defects effecting substantial rights may be noticed by the Appellate Court although not brought to the attention of the trial court. (*United States* v. *Jones*, 7 Cir., 204 F. 2d 745.) (R. 867.)

As to Russo the Appellate Court in its opinion admits that the prejudicial evidence was introduced against him but were of the opinion that "it had very slight effect." No one can say that the effect of the introduction of the complained of evidence did not affect the jury and that he would have been convicted even though that evidence had not been introduced. He did not, for this reason receive a fair and impartial trial.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

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WILLIAM SKALLY AND WILLIAM RUSSO, PETITIONERS

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 865-875) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 14, 1954 (R. 876). The petition for a writ of certiorari was filed on February 11, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the record so plainly showed entrapment of petitioner Skally as to entitle him to raise this defense for the first time on appeal.

2. Whether there was error in admitting in evidence against petitioner Russo, as an admission against interest, an official document asserting that his automobile had been used to transport counterfeit currency, and, if so, whether the error was harmless.

STATEMENT

Petitioners Skally and Russo were charged in the United States District Court for the Northern District of Illinois in the first seven counts of an indictment with possession and sale of counterfeit $10 and $20 Federal Reserve notes, in violation of 18 U. S. C. 472 and 473 (R. 4-7). Two other defendants, James and Sam Sferas, who are not involved in the present petition for certiorari, were charged in counts 8 to 13 with the making and possession of the counterfeit notes mentioned in counts 1 through 7 (R. 8-10). Count 14 charged a conspiracy against all four defendants (R. 11-15). The jury found all defendants guilty as charged (R. 815). Petitioners Skally and Russo were sentenced to imprisonment for three years, and on appeal their convictions were affirmed (R. 843, 876).

The pertinent evidence may be summarized as follows:

John Drake, whose real name was Vladovic, had been arrested by Lieutenant Oakey, an Illinois state policeman, in July 1951 on a hijacking charge,

and from that time until March 1952 he cooperated with Oakey on criminal matters (R. 184, 187). In September 1951, petitioner Skally met Drake through an attorney named Kretske at Malizia's Tavern in Chicago, and inquired if Drake could get a contact to buy some counterfeit Cities Service bonds. Drake answered that he probably could, and later informed Oakey of the incident. (R. 191, 193-195.) On October 31, when Drake was working with the knowledge of both Lieutenant Oakey and Anheier, a federal Secret Service agent, Skally told Drake in a conversation at Malizia's that if they could not get a sale for the bonds they might be able to move about $50,000 of "curly" or counterfeit currency. At this meeting, Skally showed Drake some counterfeit five, ten, and twenty dollar bills. (R. 120-122, 195-196.) On November 9, Skally asked Drake if he had reached his contact, but Drake said he would have to have some samples first. Skally informed Drake that he would have to advance about $2,500 for materials, since the "fellows would have to see something even before they started making the money." (R. 122-123.)

On November 20, Anheier introduced Drake to Sullivan, a government agent, who was to pose as "Joe Costello" from St. Louis, a potential buyer of counterfeit currency. Drake stated that Skally had counterfeit bonds and counterfeit money for sale. At Malizia's, Drake introduced Sullivan to Skally under the fictitious name of Costello and stated that Costello wanted to buy some "curly."

Skally at first replied that he did not have and could not get any. After Skally asked Sullivan how much he could buy, Sullivan said he had money to pay but would have to "see something." Skally replied, "Hand me so much and I will make the connection so I can give you something." (R. 30-32, 50-55, 123-125.) After Skally left, Drake told Sullivan that Skally had counterfeit money, but also wanted to dispose of the bonds (R. 64-65). On the same evening, Drake phoned Skally with Anheier listening in on an extension, and told Skally that Costello would not go for the bonds because they were hot, but that he wanted the counterfeit currency. Skally replied that if there were no "shirts" (meaning bonds) the other deal for "curly" was off. (R. 66-67, 126-127, 453-454.)

The incident charged in count one of the indictment occurred on November 26, 1951. After Drake had received a number of phone calls on several different days from Skally inquiring if his man could buy the counterfeit currency, on November 26 Drake saw Skally in Malizia's talking with petitioner Russo and defendant James Sferas. After Sferas handed two $10 and two $20 counterfeit bills to Skally and left the tavern with Russo, Skally gave them to Drake as samples. Skally emphasized to Drake that he would have to obtain at least $2,500 for paper and ink to make the counterfeits. Drake turned the notes over to the government agents, and later returned two of them to Skally. (R. 127-131, 488-489.)

On November 27, Drake phoned Skally that his

man was in town so that they could go ahead with their schedule as planned. On the next day in a telephone conversation, Skally told Drake to inform Costello that "he was ready to give him the curly," but that Drake should try to push the bonds off on him also. (R. 131-132.) On November 29, Drake received $200 in genuine currency from Anheier, and paid this money to Skally at Malizia's. When Skally laughingly complained that that was "no money," Drake stated that Costello would have to see more material before paying more money. Upon being asked by Drake if he wanted to talk to Costello, who was outside in his car, Skally declined, stating he wanted to do business only with Drake. (R. 133-134.)

The incident charged in counts 2 and 3 occurred on December 18, 1951. On that date, Skally made arrangements by telephone to meet Drake at a tavern called Bill's Place. Russo had left this tavern to obtain a package with $50,000 in counterfeit money from his parked Cadillac, and had placed the package on a radiator at the entrance to the tavern. Drake stated that his man wanted only $15,000, so it was agreed that Drake should return the other $35,000 to Skally. In accordance with Skally's directions, Drake picked up the package on his way out of the tavern and observed Russo standing on the other side of the door. (R. 137-140, 203-204, 248-249, 274, 356-358, 412-414, 428-429.) After Drake took the package to Anheier, $15,000 was removed and Anheier gave Drake $750 in genuine currency to pay Skally. At Malizia's, Drake re-

turned the $35,000 balance of the counterfeit currency to Skally and paid him the genuine $750. (R. 140-142, 157-158, 204-206, 456, 466-467.)

The incident charged in counts 4 and 5 occurred on December 21, 1951. At 3:00 a. m. on that date, an unidentified man left a package containing the remaining $35,000 in counterfeit money for Drake at his apartment, after his wife had said he was not at home, although he actually was. Drake telephoned Anheier, who went to Drake's apartment to receive the counterfeit. (R. 75, 142-143, 158-159, 211-213, 457-458, 462-463, 466-467.) While Drake was in a hospital the day after delivery of the counterfeit, Skally phoned him about receiving payment from Costello, and when Drake answered that everything was "O.K.", Skally said he would meet Costello at a designated shoe store on Halsted Street (R. 145). Sullivan, with orders from Anheier to pay Skally $2,450 in genuine currency, met Skally at the store and made the payment, which he said was for the "curly." Sullivan asked Skally if he could get a new supply of counterfeit about the first of the year, but Skally stated that this was not his deal since he was picking up the money for a fellow who was sick. When Sullivan repeated his request, Skally replied, "Okay." (R. 32-34, 71-74, 275, 315-316.)

On January 11, 1952, Skally phoned Sullivan to arrange for a meeting at a drug store on Western and Jackson. After Skally stated that John Drake was out of town, Sullivan said that he wanted to get an additional supply of "curly." When Skally

stated that was John's deal, Sullivan answered that he did not care whose deal it was as long as he got the "curly." Skally said, "Well, we will give it to you. You can have it. How much do you want?" Skally and Sullivan then discussed prices for future delivery. (R. 34-36, 77-82, 275-276.) Later that night Skally and Russo were observed leaving Bill's Place together (R. 399-400, 415-416, 429-430).

On January 17, Skally phoned Sullivan to arrange for a meeting at a drug store at Western and Roosevelt Road. At this meeting, Skally offered to deliver some counterfeit if Sullivan would make a $1,000 down payment, but Sullivan refused and returned to his hotel. Skally phoned Sullivan to meet him at Bill's Place to close a deal, Sullivan went to the tavern and waited there about one hour but Skally did not appear. Russo was in the tavern while Sullivan was waiting for Skally. (R. 36-39, 83-89, 92, 430-431.) On the morning of January 18, Skally phoned Sullivan that he did not appear the previous night because his car broke down, and asked if he could bring the counterfeit to Sullivan's hotel to do business. Despite Sullivan's direction to Skally to phone again at noon, Skally did not do so, and Sullivan left Chicago to return to Milwaukee. (R. 39-40, 90.)

The incidents charged in counts 6 and 7 occurred on February 2 and the early morning hours of February 3, 1952. On the evening of February 2, at Malizia's, Skally asked Drake if he was all set to do business, and Drake, stating that his man was back in town, answered in the affirmative. Drake gave

Skally $200 in genuine currency which he said was all that Costello had given him. Skally drove Drake in his car and Drake later transferred to Russo's Cadillac. Russo instructed Drake that when he blew the horn Drake should lower the car window and a package would be handed to him. After the signal was given and Russo stopped the car, a man handed a package of $50,000 in counterfeit currency to Drake. (R. 148-151, 159-160, 214-217, 243, 466-467.) Russo asked Drake where he should meet him to receive payment for the counterfeit, but Drake protested that the agreement was that he should pay Skally or the whole deal was off (R. 152, 217). Drake left Russo's car, met Anheier and gave him the counterfeit bills, and Anheier gave him $3,300 in genuine currency to pay Skally (R. 152-153, 217-219). Drake then went to Malizia's and paid the $3,300 to Skally in the washroom, and Skally gave him $900 for his part. As he left Malizia's, Drake raised his collar as a prearranged signal to the agents that everything was all right. Drake gave to Anheier the $900 he had received from Skally. (R. 154-155, 219-221, 417-418.) Before Skally was placed under arrest at Malizia's, he had passed the remaining $2,400 "buy" money for the counterfeit to the bartender, but an agent had seen this and the money was recovered (R. 316-318, 282).

On February 3, Skally informed the government agents that he had been handling counterfeit for approximately four years, and that he had been in deals for such currency amounting to approxi-

mately $1,000,000 (R. 325-326, 367, 370-371). Skally also remarked, "You have got me. As far as I am concerned, I am done with this racket. There won't be any more." (R. 460-461.) However, at the trial, Skally, who had served sentences for robbery and alcohol tax violations (R. 646, 660-661), categorically denied any part in the transactions in counterfeit charged in the indictment (R. 625, 626, 635, 636).

Russo, who had previously been convicted of a felony (R. 680), also testified that he had nothing to do with the transactions (R. 685).

ARGUMENT

1. Petitioner Skally's claim of entrapment (Pet. 12-17) was raised for the first time in the Court of Appeals; it was not mentioned at the trial and, accordingly, the Government had no opportunity specifically to deal with such a defense in presenting its evidence. By the same token, there was no occasion for the trial judge to explain the law on that defense in his instructions to the jury. At the trial, Skally categorically denied any connection whatever with the transactions in counterfeit money proved by the Government (R. 625, 626, 635-636). His defense was patently inconsistent with the defense of entrapment, which presupposes the commission of the acts charged. Obviously, Skally and his trial counsel were not thinking in terms of entrapment, a common defense with which all experienced criminal lawyers are familiar. If petitioner thought that the evidence furnished a basis for claiming entrapment, he should have asked the

trial court for an appropriate instruction. See *Sorrells* v. *United States*, 287 U. S. 435, 452; *United States* v. *Markham*, 191 F. 2d 936, 937 (C. A. 7). Having failed to do so, he is in no position to raise the question for the first time on appeal. Rule 30, F. R. Crim. P.;[1] cf. *United States* v. *Ginsburg*, 96 F. 2d 882, 885-886 (C. A. 7), certiorari denied, 305 U. S. 620; *United States* v. *Kaiser*, 138 F. 2d 219 (C. A. 7); *Hale* v. *United States*, 149 F. 2d 401, 403 (C. A. 5), certiorari denied, 326 U. S. 732; *Boehm* v. *United States*, 21 F. 2d 283, 284, 285 (C. A. 8).

Accordingly, the Court of Appeals was correct in refusing to exercise its discretion under Rule 52(b), F. R. Crim. P.,[2] to consider the newly raised defense. Neither will this Court ordinarily consider errors not brought to the attention of the trial court, a practice "founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact." *United States* v. *Atkinson*, 297 U. S. 157, 159-160; *United States* v. *DiRe*, 332 U. S. 581, 588. That principle is particularly applicable here to preclude petitioner from asserting

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[1] "At the close of the evidence * * * any party may file written requests that the court instruct the jury on the law as set forth in the requests. * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *

[2] "PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

a defense so utterly inconsistent with the defense he chose to make at the trial.

In any event, there is no basis in the record for this new claim that agents of the Government implanted in Skally's mind the disposition to commit the offenses charged. Rather it is a case where the informer Drake and government agents merely afforded to Skally by artifice and stratagem opportunity for commission of those offenses. Skally was by no means an innocent party unacquainted with counterfeiting activities, who was introduced to counterfeiting solely by reason of inducement from government agents. It was some time before the commission of Skally's offenses that Drake and the government agents knew that Skally was dealing in counterfeit. Skally first broached to Drake the matter of selling some counterfeit bonds which Skally had. On October 31, 1951, Skally told Drake that if he could not get a sale for the bonds, perhaps they could move some "curly", or counterfeit money. Skally asked Drake directly if he had a connection for this, and showed him some counterfeit five, ten and twenty dollar bills. (R. 120-122, 195-196.) On November 15, 1951, agent Anheier learned about Drake's knowledge of Skally's counterfeiting activities (R. 483). Agent Sullivan testified that on November 20, 1951, Drake told him that he knew Skally was dealing in counterfeit money. Sullivan wanted to meet Skally, not to induce him to get some counterfeit money but to offer him an opportunity if he wanted to sell such money to Sullivan. (R. 45-

46, 54, 64.) From this evidence it is apparent that Skally's crimes were not induced by the agents, but were the result of his own predisposition and deliberate purpose to commit them.

2. At the trial, the court admitted in evidence over petitioner Russo's objection, Govt. Exhibits 10-A and 10-B, documents signed by Russo and required by the Treasury officials for the return of his Cadillac automobile, which the Government had seized after Russo had used it in the February 2, 1952, delivery of counterfeit currency (R. 597, 598-599, 608; see pp. 7-8, *supra*). On Exhibit 10-B, entitled "Report of Seizure" and dated March 17, 1952, about a half inch below Russo's signature acknowledging receipt of the automobile, the following typewritten statement was on the form before he signed it: "This automobile was seized on February 4, 1952, by Special Agents of the Secret Service, after being abandoned by the owner, for the transportation therein of counterfeit $10.00 and $20.00 Federal Reserve notes." Russo denied that he read the form or knew its contents before he signed it. (R. 344-345, 599, 687, 690.) Russo contends (Pet. 18, 19) that the admission of Exhibit 10-B was prejudicial error, contrary to the holding of the Court of Appeals that, although there was error, in view of the strong evidence against Russo, the error at worst could have had but a very slight effect and conviction would have resulted without this disputed item (R. 869-870).

We think that Exhibit 10-B was properly admitted as an admission against interest, the only

purpose for which it was offered (R. 600). Cf. *On Lee* v. *United States*, 343 U. S. 747, 756; *United States* v. *Yeoman-Henderson, Inc.*, 193 F. 2d 867, 869 (C. A. 7); *Bratcher* v. *United States*, 149 F. 2d 742, 746 (C. A. 4), certiorari denied, 325 U. S. 885; *Fitzgerald* v. *United States*, 29 F. 2d 881, 882 (C. A. 6); *Krotkiewicz* v. *United States*, 19 F. 2d 421, 424 (C. A. 6). As with any such admission, oral or written, its probative value, as against a defendant's denial that he made the statement, is for the jury to determine.

In any event, the court below correctly held that the admission of the exhibit was harmless.[3] As the court said, there was much other evidence "strongly linking Russo with the possession and sale of counterfeited currency" (R. 869-870). During the period when Skally and Drake were arranging meetings for the sale of counterfeit money, Russo had been seen conversing with Skally several times, and on one occasion the defendant James Sferas had joined them. In the December 18, 1951, incident, Russo played an important role in obtaining the package of counterfeit from his Cadillac and placing it on the radiator at the door of Bill's Place so that Drake could pick it up on his way out. Russo also figured prominently in the February 2, 1952, transaction when, by pre-arrangement, Drake transferred from Skally's car to Russo's Cadillac, Russo informed Drake that when

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[3] Rule 52(a), F. R. Crim. P.: "HARMLESS ERROR. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

he blew the horn Drake should lower the car window and a package would be handed to him, and, upon Russo's giving the signal, a man handed the package of counterfeit to Drake. See Statement, *supra*, pp. 7-8. In view of this strong evidence, the error, if any, in admitting Exhibit 10-B could have had but a very slight effect in influencing the jury. Cf. *Kotteakos* v. *United States*, 328 U.S. 750, 764; *Lutwak* v. *United States*, 344 U.S. 604, 619-620.

CONCLUSION

The case was correctly decided in accordance with established legal principles, and there is no question warranting further review by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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